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L.C., Appellant)	
)	
and)	Docket No. 21-0701
)	Issued: March 3, 2022
DEPARTMENT OF THE TREASURY,)	
INTERNAL REVENUE SERVICE, Fresno, CA,)	
Employer)	
)	

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
 JANICE B. ASKIN, Judge
 PATRICIA H. FITZGERALD, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 1, 2021 appellant, through counsel, filed a timely appeal from a February 23, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 23, 2021 decision, OWCP received additional evidence, and appellant submitted additional evidence upon appeal. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$16,873.21 during the periods July 1, 2014 through July 20, 2019 and February 3 through April 15, 2020, for which she was without fault, as she concurrently received Social Security Administration (SSA) age-related retirement benefits and FECA wage-loss compensation benefits without appropriate offset; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 3, 1992 appellant, then a 40-year-old data transcriptionist, filed a claim for occupational disease (Form CA-2) alleging that she sustained injuries due to factors of her federal employment. OWCP accepted her claim for calcifying tendinitis of the right shoulder, right complete rotator cuff tear, and right tenosynovitis of the hand and wrist.

By decision dated September 2, 1999, OWCP finalized a proposed reduction of appellant's compensation, finding that she was not totally disabled and capable of earning wages in the constructed position of a hostess.

Appellant began working as a self-employed childcare provider in January 2001. OWCP compensation history records indicate that she received payments for loss of wage-earning capacity (LWEC) on the periodic rolls as of June 16, 2002.⁴

On July 16, 2020 OWCP provided SSA with a FERS/SSA dual benefits form to obtain information regarding appellant's receipt of SSA age-related retirement benefits.

On July 29, 2020 SSA completed the dual benefits form, which reported appellant's SSA age-related retirement benefit rates with a FERS offset and without a FERS offset from July 2014 through December 2019. Beginning July 2014, the SSA rate with FERS was \$718.20 and without FERS was \$481.20. Beginning December 2014 and December 2015, the SSA rate with FERS was \$730.40 and without FERS was \$489.30. Beginning December 2016, the SSA rate with FERS was \$732.50 and without FERS was \$490.80. Beginning December 2017, the SSA rate with FERS was \$747.10 and without FERS was \$500.60. Beginning December 2018, the SSA rate with FERS was \$795.10 and without FERS was \$514.50. Beginning December 2019, the SSA rate with FERS was \$810.00 and without FERS was \$522.70.

In a letter dated August 28, 2020, OWCP notified appellant that, based on information provided by SSA regarding the amount of her age-related retirement benefits which were attributable to federal service, her FECA wage-loss compensation had been adjusted. It explained that she was in receipt of SSA age-related retirement benefits every four weeks in the amount of \$810.00. However, appellant's federal service increased her monthly SSA age-related retirement benefit payments by \$287.30, which must be offset as this portion of her SSA age-related retirement benefits was attributable to her federal service. OWCP explained that the \$287.30

⁴ In a claim for compensation (Form CA-7) dated May 16, 2018, appellant requested a schedule award. By decision dated October 2, 2019, OWCP granted her a schedule award for an additional 9 percent permanent impairment of the right upper extremity, for a total of 16 percent permanent impairment. The award ran for 28.08 weeks from September 15, 2019 through February 2, 2020.

monthly offset would be adjusted to a 28-day payment cycle to result in a \$265.20 offset. Appellant was advised that, following the SSA offset and deduction of health benefits premiums, her 28-day gross FECA payment would be reduced from a gross payment of \$531.00 to a new net FECA compensation payment of \$20.18, every 28 days. Her compensation benefits were adjusted effective August 16, 2020.

In a FERS offset overpayment calculation worksheet dated August 31, 2020, OWCP calculated appellant's total overpayment amount from July 1, 2014 through September 20, 2019 and February 3 through August 15, 2020 as \$16,873.21. It noted that, as she received a schedule award from July 21, 2019 through February 2, 2020, this period was not affected by the FERS offset. OWCP indicated that from July 1 until November 30, 2014 the amount of the overpayment was \$1,195.42; from December 1, 2014 to November 30, 2015 the amount of the overpayment was \$2,901.15; from December 1, 2015 to November 30, 2016 the amount of the overpayment was \$2,909.10; from December 1, 2016 to November 30, 2017 the amount of the overpayment was \$2,908.37; from December 1, 2017 to November 30, 2018 the amount of the overpayment was \$2,966.13; from December 1, 2018 to July 20, 2019 the amount of the overpayment was \$2,146.13; and from February 3 to August 15, 2020 the amount of the overpayment was \$1,846.93.

On September 1, 2020 OWCP issued a preliminary overpayment determination that appellant had received an overpayment of compensation, for which she was without fault, in the amount of \$16,846.93 because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for the periods July 1, 2014 through September 20, 2019 and February 3 through August 15, 2020. It provided an overpayment calculation and found that she was without fault in the creation of the overpayment.⁵ OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20). It further requested that she provide supporting financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support income and expenses. Additionally, OWCP provided appellant with an overpayment action request form and further notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a pre-recoupment hearing.

On September 11, 2020 appellant requested a pre-recoupment hearing before a representative of OWCP's Branch of Hearings and Review regarding possible waiver of recovery of the overpayment. The hearing was held on January 6, 2021.

In a Form OWCP-20 dated January 21, 2021, appellant listed her monthly income as consisting of \$1,192.00 in SSA benefits and \$16.73 in state or local welfare payments. Her monthly expenses were listed as \$704.81 for rent or mortgage; \$400.00 for food; \$100.00 for clothing; \$240.00 for utilities; and \$100.00 for other expenses. Appellant's assets included \$10.00 in cash on hand, a checking account balance of \$8,081.46 and a savings account balance of \$10,008.70. No supporting financial documentation was received.

By decision dated February 23, 2021, OWCP's hearing representative finalized the preliminary overpayment determination that appellant had received an overpayment of compensation, for which she was without fault, because she had received FECA wage-loss compensation benefits concurrently with SSA retirement benefits. He modified the total

⁵ The Board notes that OWCP's overpayment calculation included in its preliminary overpayment determination of September 1, 2020 reflected a total overpayment amount of \$16,873.21.

overpayment amount to \$16,873.21 for the periods July 1, 2014 through July 20, 2019 and February 3 through August 15, 2020. The hearing representative noted that appellant's assets of \$18,090.16 exceeded the resource base of \$6,200.00 and therefore she did not meet hardship criteria and recovery of the overpayment would not defeat the purpose of FECA. He further noted that she had not submitted documentation supporting her income and expenses. However, the hearing representative concluded that minimum collection guidelines would not collect the debt promptly as she was currently receiving \$4.29 in net compensation on the periodic rolls every 28 days. In this regard, he indicated that appellant's monthly income included \$1,192.00 in SSA age-related retirement benefits plus \$16.73 in state assistance, for a total income of \$1,208.73. As appellant had expenses of \$1,544.81, the hearing representative determined that they exceeded her income by \$336.08. However, he noted that appellant had \$8,081.46 in her checking account and \$10,008.70 in her savings account, for a total of \$18,090.16 in her bank accounts. As to appellant's continuing compensation payments, and the recovery of the overpayment, the hearing representative stated: "The claimant is being paid \$4.29 in net compensation benefits on the periodic roll and paying the overpayment at \$1.07 ($\$4.29 \times 25\% = \1.07) every 28 days would not collect the debt promptly." He concluded therefore that, as appellant's assets exceeded the overpayment, she should repay the overpayment in full, immediately.⁶

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁷ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁸

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-related retirement benefits that are attributable to federal service of the employee.⁹ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.¹⁰

⁶ With respect to recovery of the overpayment of compensation, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA. As the hearing representative required recovery in full, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act. *See T.C.*, Docket No. 21-0612 (issued December 2, 2021); *R.W.*, Docket No. 18-1059 (issued February 6, 2019); *Cheryl Thomas*, 55 ECAB 610 (2004).

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116.

⁹ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

¹⁰ FECA Bulletin No. 97-09 (issued February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$16,873.21 for the periods July 1, 2014 through July 20, 2019 and February 3 through April 15, 2020, for which she was without fault, because she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation for that period without appropriate offset.

The record indicates that, while appellant was receiving wage-loss compensation under FECA, she also received SSA age-related retirement benefits attributable to her federal service during the relevant period. A claimant cannot concurrently receive FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service without an appropriate offset.¹¹ Consequently, the fact of the overpayment has been established.

To determine the amount of the overpayment, the portion of SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA on July 29, 2020 with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided the SSA age-related retirement benefit rates with FERS and without FERS for specific periods from July 2014 through December 2019. In a FERS offset overpayment calculation worksheet dated August 31, 2020, OWCP calculated appellant's total overpayment amount from July 1, 2014 through September 20, 2019 and February 3 through August 15, 2020 as \$16,873.21, noting that, as she received a schedule award from July 21, 2019 through February 2, 2020, this period was not affected by the FERS offset.

The Board has reviewed OWCP's calculation of benefits received by appellant for the periods July 1, 2014 through September 20, 2019 and February 3 through August 15, 2020 finds that an overpayment of compensation in the amount of \$16,873.21 was created.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹³ The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁴

The guidelines for determining whether recovery of an overpayment would defeat the purpose of FECA or would be against equity and good conscience are set forth in sections 10.436 to 10.438 of OWCP's regulations.¹⁵ Section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary

¹¹ See *D.M.*, Docket No. 19-1369 (issued June 30, 2020).

¹² See *L.W.*, *supra* note 9; *L.L.*, Docket No. 18-1103 (issued March 5, 2019); *D.C.*, Docket No. 17-0559 (issued June 21, 2018).

¹³ 5 U.S.C. § 8129.

¹⁴ *A.C.*, Docket No. 18-1550 (issued February 21, 2019); see *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁵ 20 C.F.R. §§ 10.436-10.438.

and necessary living expense, and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁶

Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁷ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁸

Section 10.438 of OWCP's regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.²⁰ In order to establish that, recovery of the overpayment would defeat the purpose of FECA, appellant must show that she requires substantially all of her income to meet current ordinary and necessary living expenses and that her assets do not exceed the established limit as determined by OWCP procedures.²¹ It considered her financial information, as reported in her completed Form OWCP-20, to determine if recovery of the overpayment would defeat the purpose of FECA. Appellant did not submit any supporting financial documentation.

¹⁶ *Id.* at § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a.(3) (September 2020). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a.(2).

¹⁷ *Id.* at § 10.437; *see E.H.*, Docket No. 18-1009 (issued January 29, 2019).

¹⁸ *Supra* note 16 at Chapter 6.400.4(c)(3) (September 2020).

¹⁹ 20 C.F.R. § 10.438.

²⁰ *Id.* at § 10.436.

²¹ *D.M.*, Docket No. 19-1311 (issued February 4, 2020); *supra* note 15.

The Board finds that OWCP properly determined that appellant's assets of \$18,090.16 exceeded the relevant resource base of \$6,200.00 for an individual as provided in OWCP's procedures.²² Additionally, the evidence of record does not demonstrate that recovery of the overpayment would be against equity and good conscience. Appellant did not submit any evidence that she relied upon the incorrect payments to her detriment or that she would experience severe financial hardship attempting to repay the debt.²³

As appellant has not established that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$16,873.21, during the periods July 1, 2014 through July 20, 2019 and February 3 through April 15, 2020, for which she was without fault, as she concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without proper offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

²² See *supra* note 16 at Chapter 6.400.4.a.(2) (September 2020).

²³ See *supra* note 16 at Chapter 6.400.4a.(3) (September 2020); *D.M.*, *supra* note 21.

²⁴ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board